In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 141

SUNSHINE PACKING CORPORATION OF PENNSYLVANIA, PETITIONER

v.

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, NOW UNITED STATES OF AMERICA [1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 269-276) is reported at 181 F. 2d 348. The opinion of the District Court (R. 236-263) is reported at 81 F. Supp. 566.

JURISDICTION

The judgment of the Court of Appeals was entered on April 7, 1950 (R. 277). The petition for

[1] This is the caption of the case as it appears in the record. The action was originally brought by Chester Bowles, the then Administrator of the Office of Price Administration, who was later succeeded by Paul Porter as plaintiff (R. 1). After the O.P.A. was terminated, the United States of America was substituted as party plaintiff (R. 235).

a writ of certiorari was filed on June 21, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Maximum Price Regulations Nos. 185 and 409 established ceiling prices for certain processed foods and provided that, in determining the canner's maximum price, an allowance should be made for the actual increase over the base period in the cost of the raw agricultural commodity. The question is whether, in an action for treble damages by the Government, it was open to petitioner to challenge the validity of the computation of ceiling prices under the regulations which eliminated as a cost factor any increases over the base period in the actual wastage of raw material in processing.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942 and the maximum price regulations issued thereunder are set forth in the Appendix, *infra,* pp. 9-16.

STATEMENT

In January 1944, the Price Administrator, on behalf of the United States, filed an action for treble damages under Section 205(e) of the Emergency Price Control Act of 1942 charging that petitioner, a corporation engaged in the business of packing and processing various types of fruit, sold and delivered from Febru-

ary 1, 1943, to and including June 21, 1943, strawberry juice, black raspberry juice, and frozen red currants to named purchasers (Ex. II, R. 11; Ex. IV, R. 15, at prices higher than the maximum prices permitted by M. P. R. No. 185, covering the juices, and No. 409, which had incorporated M. P. R. No. 207, covering the currants (R. 5-7).[2] Petitioner filed an answer and an amended answer (R. 44-54) in which it alleged, *inter alia,* that the alleged sales of strawberry juice, black raspberry juice, and currants were not made at excessive prices because the correct ceiling prices were higher than those computed by the Government (R. 46-47, 48, 52, 53). At the trial it was established that in computing the ceiling prices for those products the Government did not include as a cost factor increased wastage of the raw material over the base year 1941 (R. 56-63, 77, 83). M. P. R. Nos. 185 and 409 did not allow for such increased wastage (R. 56-63, 77, 83) and the prices charged by petitioner in respect of the sales here involved would not have been in excess of the maximum price ceilings if increased wastage had been considered as a factor in cost computation (R. 76-78, 80-81, 83). In addition, petitioner unsuccessfully sought to

---

[2] Petitioner was also charged with selling and delivering canned crabapple juice, grape juice and strawberries in violation of General Maximum Price Regulation and M. P. R. Nos. 207 and 409 (R. 5-7), but none of these alleged violations are involved here. (See *infra,* pp. 4, 5.)

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and Regulations involved	2
Statement	2
Argument	5
Conclusion	8
Appendix	9

CITATIONS

Cases:

Rosensweig v. *United States*, 144 F. 2d 30, certiorari denied, 323 U. S. 764	8
Yakus v. *United States*, 321 U. S. 414	8

Statute and Regulations:

Emergency Price Control Act of 1942, c. 26, Title II, 56 Stat. 29:	
Sec. 203	8, 9
Sec. 204	8, 10
Sec. 205	2, 11
Maximum Price Regulations:	
No. 185 (7 F.R. 5772)	3, 4, 5, 6, 7, 12
No. 207 (8 F.R. 2977-2978)	3, 4, 5, 7, 13
No. 306 (8 F.R. 1114-1116)	4, 7
No 409 (8 F.R. 8358-8359)	3, 4, 5, 6, 7, 15

establish that price ceilings under M. P. R. Nos. 185, 207 and 409 were to be computed in the same manner as price ceilings under M. P. R. No. 306, which later replaced Nos. 185, 207 and 409 and which clearly considered current yield as a cost factor (Def. Exs. "LL" and "MM", R. 151-163, 64-68), but the court ruled that No. 306 was irrelevant in this action since it covered prices subsequent to the period involved here (R. 68).

At the conclusion of the trial, the judge charged the jury, *inter alia,* as follows (R. 185, 218):

> * * * under Maximum Price Regulations Nos. 185, 207, 409, the question of yield cannot be considered in computing the allowable "actual increases in the cost of the raw agricultural commodity" mentioned therein.

The jury found that petitioner violated the price ceilings as alleged in the complaint in the sale of strawberry juice, black raspberry juice, currants and crabapple juice (R. 226, 229-232), but that it did not violate the price ceilings in the sale of strawberries and grape juice (R. 226, 227-229). Since the jury also found that the violations, though not wilful, were the result of failure to exercise practicable precautions to comply with the ceiling price (R. 229-232), the court entered judgment for the Government for double the amount of the overcharges found, or a total of $14,388.32 (R. 264).

On appeal, in addition to the question involved here, petitioner raised others which are not renewed here. The Court of Appeals affirmed the judgment in respect of the sales of black raspberry juice, currants and strawberry juice, but reversed the judgment in respect of the sales of crabapple juice, thus reducing the judgment to $9,370.32 (R. 276, 277).

ARGUMENT

Petitioner's sole contention here, which was rejected by both the District Court (R. 251-253) and the Court of Appeals (R. 271-272), is that the maximum price ceilings for strawberry juice, black raspberry juice and currants computed by the Government under M. P. R. Nos. 185 and 409, which incorporated M. P. R. No. 207, failed to include yield or wastage of the raw agricultural commodities as an element of cost and accordingly were erroneous. Petitioner argues that this method of pricing "can become a dangerous and upsetting precedent generally because it repudiates the time honored custom of considering 'yield' (or conversely 'wastage') as one of the primary elements in figuring costs" (Pet. 3). But the contention ignores the fact that under M. P. R. No. 185, section 1341.102(a), No. 207, section 1341.202(a), and No. 409, section 3(b), the first element considered in pricing was the f. o. b. factory price charged by the canner for the 1941 pack. Petitioner's 1941 prices undoubtedly reflected wastage,

so that what petitioner is really complaining about is that the Government's computations under M. P. R. Nos. 185 and 409 covering 1942 and subsequent packs confined it to the same yields as it had in processing the 1941 packs and made no allowances for decreased yields in subsequent packs, although the regulations specifically allowed increases in the costs of raw materials to be added to the 1941 prices.

Petitioner does not deny that M. P. R. Nos. 185 and 409 did not expressly provide that actual yield was a factor to be considered in determining allowable increases in raw material costs and consequently in the price ceiling (Pet. 3, 10), but argues that since the regulations were silent on this question, the courts should take judicial notice of the universal acceptance of the factor of yield in the cost of raw material (Pet. 7-9). We submit that petitioner is in error in stating that the regulations were silent on this question. Although the regulations did not expressly state that decreased yield or increased wastage was to be disregarded, the elements set forth therein which the canner used in determining ceiling prices negate the consideration of actual yield as a factor in increased costs of raw material. For example, section 1341.102 (a) (3) of M. P. R. No. 185, which was substantially similar to M. P. R. No. 409, section 3(b)(1), allowed the canner to add to his 1941 price "the actual increase * * * in the cost of the raw agricultural

commodity" for the 1942 pack over the cost of the same raw materials for the 1941 pack. Section 1341.102(b)(2)(i) and (ii) defined "actual increase in the cost of the raw agricultural commodity" as the difference between the weighted average cost to the canner of the raw material purchased for the 1941 pack and the weighted average cost of such material for the 1942 pack and stated that the weighted average cost was to be computed by "dividing the total amount paid [for the raw material] by the number of tons or other units purchased." This definition, by providing that the cost of the raw material was to be computed by dividing the total amount paid by the number of units purchased, rather than by the number of units available for canning after processing, clearly eliminated decreased yield or increased wastage after the base year 1941 as a factor in cost pricing.

Petitioner's reliance (Pet. 10-11) on M. P. R. No. 306 (8 F. R. 1114-1116) was correctly rejected by the Court of Appeals (R. 272) and the District Court (R. 253) because it did not determine the price ceilings involved in the instant case and had no effect on them. The fact that it replaced M. P. R. Nos. 185, 207 and 409 is not significant in view of the provisions of those regulations.

In view of the foregoing, petitioner's challenge of the validity of the price computations under the regulations in that they did not reflect the actual

wastage of raw material in the processing of the commodities involved is in effect a claim that the regulations were invalid and accordingly is not a question that can be considered in this action. Such a claim is within the exclusive jurisdiction of the Emergency Court of Appeals (Emergency Price Control Act of 1942, Sec. 204 (d)) and of this Court on certiorari. *Yakus* v. *United States,* 321 U. S. 414, 427-431; *Rosensweig* v. *United States,* 144 F. 2d 30, 33 (C. A. 9), certiorari denied, 323 U. S. 764. Furthermore, there is no merit in petitioner's contention that it had no standing to resort to the Emergency Court of Appeals (Pet. 4). See Emergency Price Control Act of 1942, Sec. 203 (a), Appendix, *infra,* pp. 9-10.

CONCLUSION

The decision below is correct. No question of importance or conflict of decisions is presented. The petition for certiorari should be denied.

Respectfully submitted,

ARNOLD RAUM,
Acting Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
ROBERT S. ERDAHL,
FELICIA H. DUBROVSKY,
Attorneys.

AUGUST, 1950.

APPENDIX

The Emergency Price Control Act of January 30, 1942, c. 26, Title II, 56 Stat. 29, provided in pertinent part:

Sec. 203. Procedure

(a) Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date

thereof specified in section 206) in respect of which the protest is filed, whichever occurs later, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

* * * * *

Sec. 204 Review

(a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall

have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, * * * *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. * * *

* * * * *

(d) * * * The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

Sec. 205. Enforcement

* * * * *

(e) If any person selling a commodity violates a regulation, order, or price schedule

prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. * * * If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed * * *.

2. Maximum Price Regulations Nos. 185, 207 and 409 provided in pertinent part:

No. 185 (7 F. R. 5772):

§ 1341.102. *Canner's maximum prices for canned fruits and canned berries.* (a) The canner's maximum price per dozen f. o. b. factory, for each kind, grade, and container size of canned fruits or canned berries packed after the 1941 pack shall be: (1) The weighted average price per dozen f. o. b. factory charged by the canner for such kind, grade and container

size during the first 60 days after the beginning of the 1941 pack; plus

* * * * *

(3) The actual increase per dozen cans in the cost of the raw agricultural commodity delivered at the factory for the 1942 pack over the cost of the same raw agricultural commodity delivered at the factory for the 1941 pack.

(b) In determining the canner's maximum price:

* * * * *

(2) The "actual increase in the cost of the raw agricultural commodity" shall be the difference per dozen cans of each kind, grade and container size, between;

(i) The weighted average cost to the canner of the raw agricultural commodity purchased for the 1941 pack, computed by dividing the total amount paid by the number of tons or other units purchased; and

(ii) The weighted average of the prices per ton or other unit, paid or contracted to be paid by the canner to the grower for the same raw agricultural commodity in 1942, based on not less than the first 75 percent of his 1942 purchases.

* * * * *

No. 207 (8 F. R. 2977-2978):

§ 1341.202 *Packer's maximum prices for frozen fruits, berries and vegetables.* (a)

The packer's maximum price per dozen or other unit f. o. b. factory for each kind, grade and container size of frozen fruits, berries and vegetables packed after the 1941 pack shall be:

(1) The weighted average price per dozen or other unit f. o. b. factory charged by the packer for such kind, grade and container size during the first 60 days after the beginning of the 1941 pack, revised to reflect no more than seven months' storage in the case of quick-frozen fruits, berries and vegetables and no more than thirty days' storage in the case of cold-packed fruits, berries and vegetables; plus

* * * * *

(3) The actual increase per dozen or other unit in the cost of the raw agricultural commodity delivered at the factory in 1942 over the cost of the same raw agricultural commodity delivered at the factory for the 1941 pack, except as hereinafter limited in paragraph (b) (2) of this section.

(b) In determining the packer's maximum price:

* * * * *

(2) The "actual increase in the cost of the raw agricultural commodity" shall be:

(i) The difference per dozen or other unit of each kind, grade and container size between (*a*) the weighted average cost per unit to the packer of the raw agricultural commodity purchased for the 1941 pack, computed by divid-

ing the total amount paid by the number of units purchased, and (*b*) the weighted average of the prices per unit, paid or contracted to be paid by the packer to the grower for the same raw agricultural commodity in 1942, based on not less than the first 75 per cent of his 1942 purchases: * * *

No. 409 (8 F. R. 8358-8359):

Sec. 3. *Maximum prices which packers may charge for frozen fruits, berries and vegetables packed and frozen in containers other than barrels*—(a) *General pricing method.* The packer shall figure a maximum price per dozen or other unit, f. o. b. shipping point, for each separate kind, grade, style of pack, container type and size of frozen fruits, berries, and vegetables packed and frozen, after the 1942 pack, in containers other than barrels. The maximum price for such an item, including all storage, shall be figured by adding together his base price and his permitted increase for miscellaneous costs.

(b) *Base price.* The packer's base price in each case shall be his maximum price, f. o. b. factory, for the item under Maximum Price Regulation No. 207, after it has been adjusted for raw material costs. * * *

(1) *Adjustment for commodities included in the Commodity Credit Corporation's raw materials program.* In the case of commodities included in the Commodity Credit Corporation's raw materials program the packer shall adjust for raw material costs in each case, as

follows: First, he shall determine the weighted average cost for raw materials used in the 1942 pack of the product which he figured under § 1341.202 (b) (2) of Maximum Price Regulation No. 207. If this figure is *less* than the price at which the Commodity Credit Corporation will resell the raw product to packers in that area, after these figures have been converted to cents per dozen or other unit of the finished product, the difference between them shall be added to the maximum price for the item under Maximum Price Regulation No. 207. If this figure is greater than that resale price, after conversion to a finished product basis, the difference between them shall be subtracted from the maximum price for the item under Maximum Price Regulation No. 207. The figure resulting from this addition or subtraction is the packer's base price in sales to purchasers other than United States agencies.

* * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 898146 72